1-1994

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Accounting and Business Review
Vol. 1, No. 1, (Jan. 1994) 159–165

THE UNCTAD LINER CODE: A DEAD LETTER?

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The UNCTAD Code of Conduct for Liner Conferences entered into force in 1983. The Code's cargo allocation scheme or '40-40-20 rule' aims to provide shipping lines of developing countries with a fair chance to compete for the carriage of their seaborne trade. However, the Code has not been effective in meeting its stated objectives for a variety of reasons. Amongst the administrative difficulties are (i) the complications introduced by the EEC's Brussels Package, (ii) the definition of national lines, (iii) the unit of measurement for cargo allocation purposes, and (iv) the monitoring of cargo movements. The tremendous growth in non-conference container traffic over the last two decades has undermined the conference liner trade and therefore the importance of the Code's cargo sharing arrangement. It is thus, for all practical purposes, a dead letter.

Since World War II, barriers to international trade have been reduced under the terms of the General Agreement on Tariffs and Trade (GATT). Merchant shipping, however, is one sector where such a trend toward greater trade liberalisation has been reversed. At the end of World War II, government intervention in merchant shipping was minimal and international shipping was owned and controlled almost exclusively by a few maritime powers. Since then, government intervention to protect new shipping fleets from perceived unfair competition from established fleets has become increasingly common. Examples of such policies include cabotage restrictions, cargo preference laws, restrictive bilateral agreements, operating subsidies, and tax benefits, etc. Protectionism in the liner conference trade was institutionalised in the 1983 UNCTAD Code of Conduct for Liner Conferences or UNCTAD Liner Code. This paper discusses the impact or rather non-impact of the Code on international shipping.

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DEVELOPMENT AND OBJECTIVES OF THE UNCTAD LINER CODE

Prior to World War II, international merchant shipping was the exclusive preserve of the colonial powers, and was largely dominated by the fleets of the industrialised Western European countries such as the United Kingdom, Norway, and Greece. After the war, numerous colonies in Asia, Africa, and South America gained independence. Most of these newly independent countries had to rely on shipping conferences for the carriage of their seaborne trade, with no control over often exorbitant freight rates. Their attempts to establish national shipping fleets in order to break into the international shipping market were unsuccessful because of their inexperience and the dominant power of the established liner conferences. The European dominated conferences were often closed to new members, and were suspected by many developing countries of behaving in a monopolistic fashion.

These prompted the developing countries to call for an international shipping convention to assert their rights to participate in the conference liner trade. The United Nations Conference on Trade and Development (UNCTAD) in 1964 (Geneva) and 1966 (New Delhi) provided timely platforms where the issues were raised and debated. At the third UNCTAD conference in 1972 (Santiago de Chile), a draft Code of Conduct for the Liner Conference System submitted by the developing countries, received strong support from the Group of 77 (consisting of Third World countries), but met with opposition from many of the developed countries belonging to the OECD.

The UNCTAD Liner Code endorses the closed conference system,[1] and instead of emphasizing greater competition, tries to protect the national lines of the developing countries from competition through various means. The main objectives of the Code are:

(1) to provide the right to automatic conference membership for the national shipping lines of countries whose foreign seaborne trade is being served.

(2) to require the participation and consent of the national shipping lines of all major conference decisions affecting the countries being serviced.

(3) to require conferences to justify freight rate changes.

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[1] A closed conference restricts membership and is illegal under United States anti-trust laws. Open conferences, which do not restrict membership, are mostly found on trade routes serving the United States.

(4) to guarantee the participation of the countries in bilateral seaborne trade. Unless otherwise mutually agreed upon, each bilateral trading partner should have equal rights to the volume of conference traffic transportation between them. Third country shipping lines should have the right to a small part, such as 20 percent of the trade. This has been referred to as the 40:40:20 rule which reserves 40 percent of the cargo for the national lines of the origination country, 40 percent for the national lines of the destination country, and 20 percent for cross-traders from other countries.

The United Nations subsequently convened the Conference of Plenipotentiaries on a Code of Conduct for Liner Conferences. On April 6, 1974, the Conference adopted the Convention by an overwhelming majority roll-call vote of 72 to 7, with 5 abstentions. The adoption of the Code by UNCTAD specified that it was to enter into force six months after the date on which no fewer than 24 states with a combined shipping tonnage of at least 25 percent of the world's general cargo fleet have ratified the Code. This requirement was met on April 6, 1983 when 59 countries had granted ratification and the Code came into effect in October 1983.

The countries that ratified the Code were mainly from South and Central America, Africa, Asia and Central Europe (Sturmey, 1985, Annex 2). The United States has always strongly opposed the Code and is unlikely to ratify it. Singapore, with a large proportion of its fleet engaged in cross-trading, has also opposed the Code. The European Economic Community members were initially divided over ratification. While some of them were against it because the Code infringes upon free trade and is contrary to the principles and objectives of the Treaty of Rome, others saw the Code as a means of restraining some of the worst excesses of cargo reservation practised by developing countries. Agreement was finally reached and enshrined in a 1979 EC Regulation known as the 'Brussels Package' (Ademuni-Odeke, 1988: 20-27; Farthing, 1987: 136-138).

Under the Brussels Package, the cargo sharing provision does not apply to trade among the EEC countries or between the EEC countries and other members of the OECD who are prepared to reciprocate. The concept of a national shipping line has also been redefined as any shipping line that is established within an EEC member country. For example, the 40 percent share of the bilateral trade between The Netherlands and a developing country is not reserved for The Netherlands alone, but is available to the shipping lines of all the EEC countries. Ademuni-Odeke (1988, p. 23) estimated that as a result of the Brussels Package and the non-ratification of the Code by some OECD countries, the 40:40:20 rule will in practice apply to only about 25 percent of the world's liner conference trade, since 75 percent of the world's liner conference trade is between developed countries. Since liner conference trade comprises only an estimated 20 percent of the world's seaborne cargo volume, only 5 percent of the world's seaborne trade is subject to the Code's cargo-sharing provisions. The Brussels Package has thus enabled the EEC countries to ratify the UNCTAD Code, but on modified terms which have crippled it.

OUTCOMES IN THEORY AND PRACTICE

Among the high sounding objectives of the UNCTAD Liner Code are the following: to improve the liner system, to facilitate the orderly expansion of world sea-borne trade, to stimulate the development of regular and efficient liner services, and to take into account the special needs and problems of the developing countries with respect to the activities of liner conferences serving their foreign trade.

The argument in favour of the Code is that the new fleets of the developing countries are unable to compete on equal terms with the established shipping lines of the developed countries. Because the conference system had precluded fair competition in the past, the Code's cargo allocation scheme now gives the shipping lines of the developing countries a fair chance. The argument is that they ought to be given some protection to help them get off the ground, in line with the 'infant industry' argument. However, protection under the infant industry argument is meant to be temporary and should cease once the industry is established. However, there is nothing in the Code that stipulates that the cargo allocation arrangement is only to be temporary, and should be phased out over time.

The impact of such a cargo allocation system, where implemented, may be to cause the replacement of efficient shipping provided by developed countries by less efficient shipping provided by developing countries, resulting in increased costs and freight rates and a decline in the quality of shipping services. This may potentially result in increased prices for imports as well as exports, thus affecting the international competitiveness of developing countries. Where the national shipping lines of developing countries do not have sufficient capacity to handle the allocated amount of cargo as fleet acquisition is a costly investment, the need to charter foreign vessels will result in an outflow of foreign exchange.[2] The emphasis on developing national shipping lines at the expense of other more pressing investments in developing countries may also result in misallocation of resources.

In practice, countries which have ratified the Code have also been faced with numerous problems in implementing it. First, there is the need to identify the

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[2] See Frankel (1987) for discussions of the economic implications of various protectionist policies in international shipping.

category under which a particular shipment falls. A number of countries which have ratified the Code have done so only conditionally, and the EEC and OECD countries, through the Brussels Package, have reinterpreted many aspects of the Code. Farthing (1987, p. 139) has identified four categories:

(1) Both ends of the trade are governed by the Code;

(2) Trade is not governed by the Code as a result of non-ratification by at least one country at one end of the trade;

(3) Trade is governed by the Code plus the Brussels Package, where both countries have ratified subject to the Brussels reservations;

(4) Trade is governed by the Code plus Brussels Package at the EEC or OECD country end, and by the Code at the developing country end.

Second, there may exist a problem countering on the definition of national lines. While ships flying the flag of the country are generally considered to be national lines, for countries with open registers there may be no genuine link between flag and ship (Toh and Susilowidjojo, 1987). For example, a ship may fly a convenience flag registered in Liberia, be owned by a firm in Greece, and be managed by a firm based in the United States.

Third, the measurement of cargo shares may become a debatable point, depending on which unit of measurement is to be used (value, tonnage or physical volume). Sturmey (1985, p. 39) has advocated that both a tonnage pool and a money pool be established for cargo allocation purposes. Such a scheme would require complex administrative guidelines in order for each country to obtain the allocated proportions in terms of both tonnage and value in its cargo bookings. Alternatively, Sturmey (1985) has suggested the use of either a system of compensatory payments between shipping lines or of compensatory variations in cargo allocations over time.

Fourth, the implementation of the Code involves the need to closely monitor the loading and unloading of cargo onto and from ships belonging to liner conferences serving the trade of ratifying countries. This may involve self monitoring by the conferences, or the establishment of various controlling bodies such as freight allocation bureaus. In the worst case, such regulatory bodies may become bottlenecks in the smooth movement of cargo, resulting in increased overall costs.

Fifth, the Code applies only to conference liners and does not apply to non-conference liners or bulk carriers. Since the early 1970s, when the Code was drafted, the tremendous growth of container traffic has resulted in the decline of the share of trade carried by conference liners. Large container liner operators such as Maersk and Evergreen are non-conference members, and are therefore not subject to the restrictive terms of the Code. Some developing countries, though, have tried to extend the provisions of the Code to all liner trades, accusing non-conference liners of 'eating into their quota' (Damas 1991, p. 45).

Finally, many of the smaller Asian and African nations simply do not have the scale economies to operate viable, efficient, and reliable national shipping lines. This is often because they have been unable to take advantage of the lower costs of operating large container ships. Moreover, the economic crises faced by many African countries in the 1980s have resulted in a decline in their volume of trade. These countries have not been able to afford the resources to invest in the new generation of larger and cost saving container ships. All of these factors have led to a fall in the size of the shipping fleets of many West African nations during the late 1980s (Damas 1991, p. 43). The national conference lines of some developing countries, using their rights of guaranteed carriage of cargo, have instead sold their loading rights to the highest bidders usually the operators of non-conference lines from developed countries, thus fulfilling the letter, but not the spirit, of the Code.[3]

CONCLUSION

Nearly thirty years since the idea was first raised, and ten years since it has entered into force, the UNCTAD Liner Code has not achieved much in terms of increasing the market share of the shipping fleets of developing countries. On a positive note, however, it has drawn attention to the previously closed shop operations of the conference liner system dominated by the developed countries. Conference membership is now automatic for the shipping lines of developing countries on routes affecting their seaborne trade. However, increases in the size of shipping fleets of developing countries during the past decade cannot be largely attributed to this. Countries pursuing flag-of-convenience and quasi-flag-of-convenience policies have seen the largest increases in the size of their merchant fleets. Moreover the rapid increase in container trade as well as the economies associated with the operation of increasingly larger container vessels have undermined the conference liner trade and therefore the importance of the Code's cargo sharing arrangement. Also, many countries which have ratified the Code have been unwilling or administratively unable to enforce it. The well intentioned but poorly conceived, overly ambitious, and largely

[3] See Damas (1991) for a detailed account of the contradictions inherent in the implementation of the Code for seaborne trade linking West and Central Africa to Southern Europe.

ineffective UNCTAD Liner Code has therefore failed in achieving its stated objectives. It is, for all practical purposes, a dead letter.

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